fact that the Respondents have not brought the suit under the TVPA, the court remanded "for a determination regarding whether the plaintiffs should be allowed to amend their complaint to state such a claim."

The Court of Appeals then immediately issued a mandate to the lower Court for a determination consistent with its decision. The Petitioner's Attorney did not move to stay the mandate pending the filing of a petition for a Writ of Certiorari in the Supreme Court. Instead, Petitioner's attorney followed the case to the Lower Court and participated in the status Conference where the Presiding Judge, Hon. Matthew F. Kennelly of the Northern District of Illinois Ordered the Respondents to amend their Complaint to include the TVPA and gave the Petitioner another chance to file a second Motion to Dismiss for alleged non exhaustion of local remedies in Nigeria consistent with the Court of Appeals Mandate.

Petitioner's Counsel filed a second Motion to Dismiss on exhaustion requirements of TVPA. In a Memorandum of Opinion by the presiding Judge, Hon. Matthew Kennelly, the Petitioner's second Motion to Dismiss was denied. Hence the petitioner is pursuing this petition concurrently with the substantive case before Honorable Kennelly at the District court.

SUMMARY OF ARGUMENT

In this case, no one contends that an exception to immunity applies. If the petitioner is covered by the FSIA, he is immune; no exception is relevant; and the suit would have been dismissed. Therefore, the only issue is whether the statute applies to individuals (who are connected with the government) who commit torture, extra judicial killing and crimes against humanity, as opposed to the state itself and its agencies. Before the instant case, the Seventh Circuit looked at a similar question in *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) which involved a head of state, and concluded that the FSIA did not apply to heads of state. Faced with the same question in the instant case, the Seventh Circuit held inter – alia, that:

> "The FSIA defines a foreign state to include a political subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state." *Ye*, 383 F.3d at 625.

The Seventh Circuit properly noted that the FSIA did not seem to subscribe to Louis XIV's not-so-modest view that "L'etat, c'est moi." How much less, then, could the statute apply to persons, like the petitioner, General Abubakar, when he was simply a member of a committee, even if, as seems likely, a committee that ran the country?".

The language of the FSIA supports the Seventh Circuit's conclusion. The overriding concern of the Act, as set out in 28 U.S.C. § 1602, is allowing judgments against foreign sovereigns "in connection with their commercial activities." The statute was passed so immunity determinations in such con

texts would be made "by courts of the United States and of the States . . .", not by the executive branch of the government. Section 1604 provides that a "foreign state" is immune unless certain exceptions apply. Under § 1603(a), a foreign state includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . . ."

The definition does not explicitly include individuals who either head the government or participate in it at some high level. The Petitioner argues, however, that "separate legal person" must mean an individual. But if it was a natural person Congress intended to refer to, it is hard to see why the phrase "separate legal person" would be used, having as it does the ring of the familiar legal concept that corporations are persons, which are subject to suit. Given that the phrase "corporate or otherwise" follows on the heels of "separate legal person," the Seventh Circuit properly held that the latter phrase refers to a legal fiction—a business entity that is a legal person. If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.

As the Seventh Circuit held, per incuriam, while disagreeing with the decision in *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990), the FSIA has been applied to individuals, but in those cases one thing is clear: the individual must have been acting in his official capacity. If he is not, there is no immunity. However, torture, extra-judicially killing and acts of crimes against humanity are clearly not within the scope of official capacity.

The Seventh Circuit properly held that not only does the Chuidian decision seem upside down as a matter of logic, but it ignores the traditional burden of proof on immunity issues under the FSIA. The party claiming FSIA immunity bears the initial burden of proof of establishing a prima facie case that it satisfies the FSIA's definition of a foreign state. The ultimate burden of proving immunity rests with the foreign state. *Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392, 397 (7th Cir. 2002); *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Virtual Countries, Inc. v. Republic of S. Africa*, 300 F.3d 230, 241 (2nd Cir. 2002).

A case, which is similar to the instant case, is *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992). The Court concluded that the Defendant, who committed acts of torture and murder while she was a President acted on her own authority and not on the authority of the Republic of the Philippines. Therefore, she was not entitled to immunity. That also meant that there was also no jurisdiction under the FSIA and that the Alien Tort Statute (ATS) was the sole basis for jurisdiction in the case.

In this case, the Seventh Circuit properly concluded, based on the language of the Statute that the FSIA does not apply to the respondent, General Abubakar; it is therefore also clear that the Act does not provide jurisdiction over the case. If General Abubakar were covered, the FSIA would be the only basis for subject matter jurisdiction over him.

The Supreme Court has said in *Argentine Republic v Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989):

> We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts. The corollary proposition in *Argentine Republic* is that the Alien Tort Statute cannot provide jurisdiction over foreign sovereigns but remains a jurisdictional basis for suits against other defendants. And the ATS is, in fact, the basis on which plaintiffs in our case claim jurisdiction.

After the District court issued its decision in this case the Supreme Court extensively considered the ATS. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), established that the ATS is a jurisdictional statute that creates no new causes of action. In sum, this Court has held in Sosa *v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) that "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping . . . ." At 2764. Alvarez's case against Sosa was properly dismissed because a "single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy". At 2769.

The plaintiffs in the instant action allege significantly more appalling violations than did Alvarez. Their allegations fall into two primary categories that the *Sosa* Court specifically recognized as violations of the law of nations: torture and killing. The Supreme Court also noted that Congress has provided an "unambiguous" basis for "federal claims of tor-

ture and extrajudicial killing" in the Torture Victim Protection Act of 1991, 106 Stat. 73. *Sosa*, 124 S. Ct. at 2763.

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit Correctly Held that Petitioner fails to demonstrate that FSIA provides immunity for former Government Officials for acts of torture and extra-judicial killing, which clearly fall outside the scope of official Authority

The decision below is fully consistent with the decisions of other Courts of Appeals. There is no conflict among the Circuits on the question presented in the petition and no other compelling reason for review. This Court has repeatedly denied petitions for writs of certiorari in Alien Tort Act (ATA) cases, *see, e.g.*, *Wiwa* v *Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Trajano* v. *Marcos*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), and should deny the instant petition as well.

Enacted in 1789 as part of the First Judiciary Act, the ATA provides:

> "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

28 U.S.C. § 1350. The federal courts have interpreted the ATA in a manner, which Congress endorsed when it passed the Torture Victim Protection Act of 1991 (TVPA).

In 1789, the violations of international law that the First Congress probably had in mind were those Blackstone had identified as "[t]he principal offences against the law of nations . . .; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy." See William Blackstone, Commentaries 68.14. A highly publicized assault on the French ambassador in 1784 is thought to have been the specific impetus for including this provision in the First Judiciary Act. *See* Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 469-70 (1989); William R.Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491-94 (1986); Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1, 24-27 (1985). Yet no statute created a separate cause of action for these violations of the law of nations or any others, and even Judge Bork was forced to acknowledge that a separate cause of action should not be required. In 1781, the Continental Congress had specifically listed the first two offenses in a resolution recommending that the States enact laws to punish infractions of the law of nations and to authorize suits

for damages by the injured party. Resolution of Nov. 23, 1781, 21 Journals of the Continental Congress 1774-1789, at 1136-37.

The First Congress passed no statutes granting a separate cause of action to bring suit under the ATA because that requirement was unknown at the time. The phrase "cause of action" became a legal term of art only in 1848, when the New York Code of Civil Procedure abolished the distinction between law and equity "and simply required a plaintiff to include in his complaint '[a] statement of the facts constituting the cause of action.' " *Davis v. Passman*, 442 U.S. 228, 237 (1979) (quoting 1848 N.Y. Laws, ch. 379, § 120(2).

In 1789, the law of nations was considered to be part of the common law, and the First Congress expected "torts in violation of the law of nations" to be actionable at common law just as other torts were. To limit the ATA to those violations that were recognized in 1789 would be contrary to the expectations of the First Congress, which understood that the law of nations evolves. *See, e.g.*, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J., concurring) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); *United States* v. *La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.), *overruled on other grounds*, 23 U.S. (10 Wheat.) 66 (1825) ("It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations."). It would also be contrary to the text of the ATA,

which does not enumerate specific torts but rather provides jurisdiction over "*any* civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added).

The Petitioner invites this Court effectively to repeal the ATA by engrafting onto it Foreign Sovereign Immunities (FSIA) for acts committed outside the scope of authority and in violation of the law of nations. Such repeal if allowed would be contrary to the intent of the Congress that passed the ATA and of the Congress that passed the TVPA and would the purpose for which these laws were passed by the congress. Petitioner's FSIA' argument has properly been rejected by every Court of Appeals to have considered it.

II. The Seventh Circuit Correctly held that murder, torture and other crimes against humanity are not official acts of government protected by FSI

The Court of Appeals have unanimously and correctly rejected petitioner's argument that government officials are immune from acts of torture, murder and violation of jus cogen rules of international law community while in office. This is because there are a growing number of court decisions indicating that U.S. courts are not extending FSIA immunity to officials responsible for the most significant violations of *jus cogens* norms of international law because they are deemed, by definition, unlawful and unauthorized in nature, and outside the scope of an official's authority.

The underlying justification for revoking immunity for officials who violate *jus cogens* norms of international law is that a sovereign state cannot defend these acts as official

since "*jus cogens* violations are considered violations of peremptory norms, from which no derogation is permitted." *Presbyterian Church of Sudan v. Talisman Energy, Inc. and the Republic of Sudan*, 244 See, e.g., *In re Estate of Ferdinand E. Marcos, Human Rights Litig. ("Hilao II")*, 25 F.3d 1467, 1471 (9th Cir.1994) (finding that acts of torture, execution, and disappearance were "clearly outside [Marcos'] authority as President."); *Trajano v. Marcos*, 978 F.2d 493, 498 (9th Cir.1992), *cert. denied,* 508 U.S. 972 (1993) (alleged acts of torture and summary execution "cannot have been taken within any official mandate," and therefore immunity does not apply.); *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189, 1197 (S.D.N.Y.1996) (agreeing that FSIA is inapplicable to the "commission of acts which exceed the lawful boundaries of a defendant's authority."); *Xuncax v. Gramajo*, 886 F.Supp. 162, 175 (D.Mass.1995) (refusing to apply immunity because the alleged violations of human rights "exceed[ed] anything that might be considered to have been lawfully within the scope of Gramajo's official authority."); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir.1990) (FSIA immunity is lost if an official acts "completely outside his governmental authority."

III. The Courts Of Appeals Have Consistently Held That ATCA Jurisdiction Is Limited To Well-Established, Universally Recognized Norms Of International Law.

In *Filartiga*, the Second Circuit held that the ATA conferred jurisdiction over torts such as official torture that violate "well-established, universally recognized norms of international law," 630 F.2d at 888, a standard to which the

Second Circuit has adhered ever since. *See, e.g.*, *Flores*, 343 F.3d at 154 (citing *Filartiga* for the proposition that "customary international law [includes only] well established, universally recognized norms of international law"); *Kadic*, 70 F.3d at 239 (stating that if "the defendant's alleged conduct violates 'well-established, universally recognized norms of international law,' then federal jurisdiction exists under the Alien Tort Act"); *Zapata* v. *Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam) (citing *Filartiga* for the proposition that the ATA applies only to "violations of universally recognized principles of international law"). This standard ensures that federal courts will apply only those international norms that are clearly accepted as binding by the community of nations. *See Filartiga*, 630 F.2d at 881 ("The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.").

As the Second Circuit subsequently noted in *Kadic*, "*Filartiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." 70 F.3d at 249. Other Circuits have consistently followed the approach set forth in *Filartiga*. In *Hilao*, the Ninth Circuit relied expressly upon *Filartiga* in holding that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory."

25 F.3d at 1475; *see also Alvarez-Machain*, 331 F.3d at 612 ("In [*Hilao*] we were careful to limit actionable violations to those international norms that are 'specific, universal, and obligatory.' "); *Papa* v. *United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (noting that "plaintiffs must allege a violation of 'specific, universal, and obligatory' international norms as part of an ATA claim"); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998) ("The applicable norm of international law must be 'specific, universal, and obligatory.').

The Eleventh and Fifth Circuits have also echoed the *Filartiga* approach. In *Abebe-Jira*, 72 F.3d 844, the Eleventh Circuit held that torture was actionable under the ATA, citing case law from both the Second and Ninth Circuits. In *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999), the Fifth Circuit held that claims based on environmental damage were not actionable under the ATA because they did not meet the standard articulated by the Second Circuit. In neither case did the Court of Appeals express any concern about a conflict among the Circuits.

Petitioner does not and could not assert that there is any substantive difference between the "well-established, universally recognized" formulation used by the Seventh Circuit and the "specific, universal, and obligatory" formulation used by the Second and Ninth. In short, there is simply no dispute among the lower Courts that the ATA confers jurisdiction over torts that violate well-established universally recognized norms of international law. This Court should disregard Petitioner's attempt to create such a conflict among

the circuits by Petitioner's misinterpretation of the decisions of the various circuits.

IV. The Courts of Appeals are not divided on the Proper reach of ATCA and have developed a consistent and manageable jurisprudence.

The Petitioner contends that the Court of Appeals, Seventh Circuit was wrong in its construction of the FSIA when it held that based on the language of the statute that the FSIA does not apply to the Petitioner and therefore, the FSIA does not provide jurisdiction over the case. Petitioner, not the Seventh Circuit, has misinterpreted the Act.

The Courts of Appeals have consistently limited jurisdiction under the ATA to torts that violate "well established, universally recognized norms of international law." *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980). As *Filartiga* itself pointed out, this standard is a "stringent one," *id.* at 881, and claims that have failed to meet it have been readily dismissed. *See, e.g.*, *Alvarez-Machain* v. *United States*, 331 F.3d 604, 617-20 (9th Cir. 2003) (en banc) (holding that claim for transborder abduction does not meet ATA standard for jurisdiction); *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 172 (2d Cir. 2003) (holding that claims based on environmental pollution do not meet ATA standard for jurisdiction).

By limiting jurisdiction to "universally recognized" norms, the federal courts have avoided imposing United States standards of conduct extraterritorially and have avoided unnecessary friction with foreign governments.

Congress endorsed *Filartiga*'s approach when it passed the Torture Victim Protection Act of 1991 and has continued to expand the availability of federal courts to hear claims based on violations of international law.

In addition, the Supreme Court has repeatedly established the criteria for determining the content and applicability of the law of nations in domestic litigation when Congress has not addressed the international standard. The touchstone is The Paquete Habana, 175 U.S. 677 (1900), where the Court stated:

> International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators . . . .Id., at 700. In Paquete Habana and its progeny, the Supreme Court approved the application of international law in U.S. courts even in the absence of positive Congressional enactment.

V. Federal Courts Applying This Standard Have Distinguished Between Claims That Are Properly Brought Under The ATA And Those That Are Not.

Since *Filartiga*, the federal courts have engaged in a careful and measured analysis of the individual claims raised in ATA cases, hearing those claims that have been based on violations of well-established, universally recognized norms of international law and dismissing those claims that have not. For example, the federal courts have recognized that the prohibition against genocide constitutes a well-established, universally recognized norm of international law.

In *Kadic*, the Second Circuit found that allegations of rape, forced impregnation, torture, and murder with the intent to destroy religious and ethnic groups in the territory of the former Yugoslavia clearly stated a violation of the international norm against genocide. 70 F.3d at 242. In *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), an association of religious and community groups alleged that defendants collaborated with the Sudanese government in a campaign of religious and ethnic cleansing against the non-Muslim population in southern Sudan. Not surprisingly, the district court found that such genocidal acts were clearly prohibited under international law and were subject to the ATA. *See also Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (claims based on genocide in Bosnia-Herzegovina); *Mushikiwabo* v. *Barayagwiza*, No. 94 CIV. 3267 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) (claims based on genocide in Rwanda). Federal courts have also recognized the viability of ATA suits for such well established claims as

torture and summary execution. *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992); *Presbyterian Church of the Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Tachiona* v. *Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Doe* v. *Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Xuncax* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Paul* v. *Avril*, 901 F. Supp. 330 (S.D. Fla. 1994); *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); *Tachiona* v. *Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *Estate of Cabello* v. *Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001); *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW); 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Xuncax* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

On the other hand, courts have rejected claims that are not based on well-established, universally recognized norms of international law. For example, federal courts have repeatedly dismissed ATA cases based on environmental harms. Most recently, in *Flores*, 343 F.3d at 140, the Second Circuit concluded after careful analysis that the alleged rights to life and health were insufficiently definite to constitute rules of customary international law and that customary international law did not prohibit international pollution. *See also Beanal*,

197 F.3d 161; *Sarei* v. *Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1160-61 (C.D. Cal. 2002); *Amlon Metals, Inc.* v. *FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991). Courts have also dismissed panoply of other ATA actions that failed to raise recognized claims under international law such as fraud, negligence, censorship, commercial torts, and conversion. ;

Indeed, the decision below illustrates the ability of federal courts to apply the ATA's jurisdictional standard. For while the Ninth Circuit concluded that here exists a clear and universally recognized norm prohibiting arbitrary arrest and detention, the experience of more than twenty years shows that the federal courts have had little difficulty determining the contours of customary international law or distinguishing claims that are based on well established, universally recognized norms from those that are not.

VI. Acts of torture and extra - judicial killing are listed as Part of the general exceptions to the jurisdictional immunity of a foreign State under the Restrictive Theory.

Since the enactment of the Act in 1976, the general exceptions to the jurisdictional immunity of a foreign state have expanded, moving beyond the realm of "commercial activity". Most recently, P.L. 105-175 of May 11, 1998 further expanded the restrictive theory. Specifically, 28 U.S.C. 1605 now provides that a foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case in: Section 1605(a)(7) – "money damages are sought against a foreign state for personal injury or death

that was caused by an act of ***torture, extrajudicial killing (Emphasis supplied)***, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act, if the foreign state is designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App 2405(j) or Section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371)".

VII. Petitioner's Cause FSIA Argument Rests On An Anachronism and Would Make the ATCA Meaningless.

The Petitioner's position rests on a self-serving anachronism. And in his fruitless search for authority to establish that the ATCA action is caught by the FSIA badly over interprets the scope of the FSIA. This Court should not assume that the First Congress intended to enact a statute that was meaningless. But if Petitioner is correct that the Plaintiffs claims against the Defendant are caught by the provision of the FSIA, that statute and indeed the TVPA would have been a nullity the moment they were passed.

In short, Petitioner's argument rests on an anachronism. It would also defeat the intent of the First Congress, which expected torts in violation of the law of nations to be actionable at common law without any further congressional action.

VIII. The Seventh Circuit's Ruling is consistent with the U.S interest in Vindicating Human Rights Violations.

Another factor militating against the Petitioner's contention of FSIA immunity is the strong interest of the U.S in vindicating international human rights violations and in holding the perpetrators of these offenses personally liable. The Seventh Circuit's decision is consistent with this position and should not be disturbed.

As noted above, the allegations in the complaint include torture and extra-judicial killing. These acts are universally condemned and the U.S has strong interest in seeing violations of international law vindicated. See e.g, *Testa v. Katt*, 330 U.S 386, 390 n.4 (1947); *Wiwa v. Royal Dutch Petroleum*, 226 F. 3d 88 (2d Cir. 2000) *cert. denied*, 532 U.S. 941 (2001).

The nature of this case makes it similar to Wiwa and this Court correctly denied certification in *Wiwa, cert. denied*, 532 U.S. 941 (2001).

In multiple public pronouncements, the U.S. Department of State has also recognized that the ATCA establishes both subject matter jurisdiction and a cause of action for serious violations of international law. In describing the ATCA in its official submission to the U.N. Committee against Torture, for example, the Government of the United States declared that U.S. law provides *statutory rights of action* for civil damages for acts of torture occurring outside the United States. One statutory basis for such suits, the Department added, is the Alien Tort Claims Act, which represents an

early effort to provide a judicial remedy to individuals whose rights have been violated under international law. *See Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at 60 (emphasis supplied).*

Similarly, in its submission to the U.N. Commission on Human Rights, the government declared that the "statute was originally enacted to provide *a remedy to individuals* who suffered a 'tort' at the hands of privateers seeking prize money under the law of admiralty. More recently, it has been applied to cases of human rights violations." ***Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, U.N. Doc. E/CN.4/1996/29/Add.2 (1996), at para. 15 (emphasis supplied).***

In *Filartiga v. Pena-Irala*, the U. S government argued that the law of nations as it had evolved obligated every state to respect the right of its own citizens to be free of torture and that this obligation bound the United States as well even in the absence of additional Congressional enactments. According to the government, the modern-day torturer had – like the pirate in the eighteenth century – become *hostis humani generis*, the enemy of all mankind, and therefore liable wherever he might be found. The United States took a similar position in 1995 in *Kadic v. Karadzic Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

CONCLUSION

For the reasons set forth above, Plaintiffs/Respondents respectfully request that the petition for a writ of certiorari filed by the Defendant/Petitioner be denied.

Respectfully submitted,

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